No. 15,374

IN THE

United States Court of Appeals

For the Ninth Circuit

RICHARD E. BENNETT, Administrator of the Estate of EVELYN E. BENNETT, Deceased,

Appellant,

vs.

ARCTIC INSULATION, INC., and DELBERT E. BOYER, Agent, Acting Within the Scope of His Employment,

Appellees.

BRIEF OF APPELLANT.

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BRIEF OF APPELLANT.

Appellant, the plaintiff below, is seeking by this appeal a review of the final judgment entered by the District Court for the District of Alaska, Fourth Division, Territory of Alaska, on the 20th day of November, 1956, dismissing appellant's amended complaint and cause of action in the lower court in an action for wrongful death.

JURISDICTIONAL STATEMENT.

The District Court for the Territory of Alaska, is a court of general jurisdiction (A.C.L.A. 1949, 53-1-1)

in civil, criminal, equity and admiralty cases. The United States Court of Appeals (Ninth Circuit) has appellate jurisdiction to review by appeal the final decisions of the District Court for the District of Alaska. (28 U.S.C. 1291, 1294.)

STATEMENT OF CASE.

Appellant, plaintiff, brought this action as Administrator of the Estate of Evelyn E. Bennett, Deceased, to recover for the death of the said Evelyn E. Bennett, caused by the negligent acts of the defendants, appellees, in allowing to be left and leaving keys in a pickup vehicle in an area of night clubs; the said vehicle being stolen by a thief and negligently being crashed into the vehicle in which plaintiff's decedent was riding, causing her death.

This action was commenced by appellant, plaintiff below, on the 18th day of May, 1956.

The Issue.

The issue is whether or not the negligent act of the defendants, appellees, was the proximate cause of the death of plaintiff's decedent and whether or not the results of such negligent acts were reasonably foreseeable and whether or not the question of proximate cause in this case and the question of foreseeability is for the jury based upon the evidence in the case.

Manner in Which the Issue Was Raised.

The Pleadings: Paragraphs II and III of plaintiff's amended complaint are hereinafter set forth:

"That the defendant, Arctic Insulation, Inc., was on the 3rd day of October, 1954, the owner of a certain 1953 Ford Pickup vehicle.

"That on said day the defendant, Delbert E. Boyer, agent acting within the scope of his employment, did negligently, and carelessly leave, unlocked, the said vehicle with the keys therein and unattended at Fairbanks, Alaska; that he did so in the area of several night clubs at South Fairbanks, Alaska.

"That said Delbert E. Boyer, knew or should have known or should have reasonably foreseen that the vehicle was left in such a place where the same might be removed without consent or authority and that plaintiff might be damaged thereby."

"That on said day, one William F. Harris, a soldier or airman in the United States Service, did steal or assume possession of the said vehicle from the place where the same was left unattended and did carelessly and negligently drive the same on the Richardson Highway to a place about One Hundred (100) feet from an intersection where a road known as the Badger Road intersects with a public highway of the Territory of Alaska, known as the Richardson Highway, and did at said time and place, carelessly and negligently cause the said stolen vehicle to strike the automobile in which plaintiff's decedent was riding, causing fatal injuries which were the direct and proximate cause of the death of plaintiff's decedent resulting from the negligence of said defendant and each of them as aforesaid."

SPECIFICATION OF ERROR.

The District Court erred in granting the motion to dismiss the amended complaint of the plaintiff and his cause of action.

ARGUMENT.

SUMMARY.

The appellant's position is that only The Creator is all seeing and omnipotent. Questions of foreseeability of harm to another must be considered in the light of a modern thinking as this question of foreseeability relates to leaving ignition keys in an unattended vehicle. That each individual case must stand or fall upon its own peculiar facts. This does not deprive a court of its supervision after hearing the evidence in a governing case, but only allows the court to exercise its supervision after the evidence and not before the evidence. That the doctrine of foreseeability depends upon what a reasonably prudent man might do or not do under the circumstances, and that this question is for the jury.

It is not deemed worthy of answering the matter of the sufficiency of allegations to establish that Boyer was an employee or agent of the Corporation at the times and places alleged in the complaint. It is generally well settled law that if the plaintiff proves that Boyer was an agent acting within the scope of his employment that such is a question of fact for the jury, the ultimate fact being whether he was such an agent acting within the scope of his employment.

The principal question of negligence in leaving the keys in the vehicle is hereafter briefed fully.

The defendant maintains that it does not believe the acts of leaving the truck unattended and leaving the keys in the ignition switch constitutes negligence, and further that such acts, even if negligent, are not the proximate cause of the plaintiff's decedent's injuries. It is here that we differ.

IT IS THE PLAINTIFF'S BELIEF THAT SUCH ACTS MAY OR MAY NOT AMOUNT TO NEGLIGENCE; THAT SUCH ACTS MAY OR MAY NOT BE THE PROXIMATE CAUSE OF THE PLAINTIFF'S DECEDENT'S INJURIES; THAT THEREFORE, THE DETERMINATION OF THESE ISSUES SHOULD BE LEFT TO A JURY.

1. Negligence.

A person leaving a motor vehicle parked on a public highway is, even in the absence of any violation of statute, ordinance, or regulation controlling such parking, under a duty to exercise ordinary care as to the manner in which he leaves it.

Assuming the existence of a duty, there are many factors which might be considered, in the absence of a statute, as to whether or not leaving a vehicle on a public street unattended and unlocked, with the keys in the ignition, would constitute negligence. In 158 A.L.R. 1376, it is stated that in such a case negligence,

> ". . . depends upon the locality in which the vehicle is left . . ."

Further on it is stated that the negligence,

> ". . . dependent upon particular facts and circumstances in each case, ordinarily [is] a question of fact . . ."

In any event, the issue of negligence is clearly one for the jury, for as stated in *Grand Trunk Railway Co. v. Ives,* 144 U.S. 408, 36 L. Ed. 485,

> ". . . What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury . . ."

The court in *Lee v. Van Buren & N.Y. Bill Posting Co.,* 1920, 190 App. Div. 742, 180 N.Y.S. 295, in reversing a lower court's dismissal of the plaintiff's complaint, said that although an electric truck was not an inherently dangerous instrumentality, under certain circumstances it would become such and therefore it was a jury question whether the defendant owner of the truck would be liable in damages for the death of plaintiff's decedent caused by a stranger starting the truck which defendant's driver had parked unattended in the street and with the keys in the ignition.

In *Barbanes v. Brown,* 110 N.J.L. 6, 163 A. 149, due to the force of gravity or some other cause unknown, the defendant's car was set in motion, causing injury to the plaintiff. The court states that:

> ". . . the general rule is that a person who leaves an automobile in a public street unattended is under a duty to exercise such care in doing so as

> a person of ordinary prudence would exercise in the circumstances; and failure to exercise such care whereby the machine by . . . some . . . cause reasonably to be anticipated or guarded against, gets under way and inflicts injury, renders such person liable therefor, in an action for damages."

See also the following cases specifically holding that even absent a statute or ordinance, failure to secure the ignition switch of a motor vehicle and leaving the doors unlocked, when parking such vehicle on a public street are circumstances tending to establish negligence which gives rise to liability where the vehicle is thereafter set in motion by an intermeddler, and injury to another results, *Lomano v. Ideal Towel Supply Co.,* 1947, 25 N.J. Misc. 162, 51 A2d 888; *Connell v. Berland,* 1928, 223 App. Div. 234, 228 N.Y.S. 20, aff'd. 248 N.Y. 641, 162 N.E. 557; *Tierney v. New York Dugan Broths.,* 1942, 288 N.Y. 16, 41 NE. 2d 161; *Bullock v. Dahlstrom* (1946 Mun. Ct. App. Dist. Col.) 48 A2d 370; *Hatch v. Globe Laundry Co.,* 1934, 132 Me. 379, 171 A. 387; *Barlow v. Verrill,* 1936, 88 N.H. 25, 183 A. 857; *Maggiore v. Laundry & Dry Cleaning Service, Inc.,* (1933 La. App.) 150 So. 394.

2. Proximate cause.

It must be realized that no definition of proximate cause can be completely satisfactory because of the necessity for defining terms used in such definition. Some of the more prominent definitions are the following: An act or omission occurring or concurring

with another, without which act or omission the injury would not have been inflicted, *Wells v. Great Northern R. Co.,* 59 Or. 165; 114 P. 92; 116 P. 1070; 34 L.R.A. (N. S.) 818; *Wodnik v. Luna Park Amusement Co.,* 69 Wash. 648; 125 P. 941; 42 L.R.A. (N. S.) 1070; the "substantial factor" test, by which the actor is liable if his negligence was a substantial factor in producing the injury complained of, 155 A.L.R. 164; the cause which leads to, produces, or contributes directly to, the production of the injury of which complaint is made, *Kelley v. Stout Lumber Co.,* 123 Or. 647; 263 P. 881; 155 A.L.R. 163; thus in *Milton Bradley Co. v. Cooper,* 79 Ga. App. 302; 53 S.E. 2d 751; 11 A.L.R. 2d 1019, the court said that by proximate cause is meant not the last act or cause, or the nearest act to the injury, but such act wanting in ordinary care as actually aided in producing the injury as a direct and existing cause.

Referring to *Wodnik v. Luna Park Amusement Co.,* supra, the authors of American Jurisprudence (38 Am. Jur. 696-7) stated:

> "Since proximate cause as an element of liability for negligence is not necessarily dependent upon nearness in time or distance, with which proximity is most readily associated, but is referred to as that cause without which the accident could not have happened, perhaps 'primary' or 'efficient' would be more descriptive of the cause of which the law takes cognizance than proximate."

But whatever definition a court might use, applying that test it believes best suited, it must always keep

in mind the words of the United States Supreme Court as stated in *Louisiana Mut. Ins. Co. v. Tweed,* 7 Wall. (U.S.) 44; 19 L. Ed. 65:

> ". . . Each case must be decided largely on the *special facts* belonging to it, and often on the very nicest discriminations." (Emphasis added.)

The most common test of proximate cause is that the injury is the natural and probable consequence of the wrongful act or omission, *Booth & Flynn v. Price,* 183 Ark. 975; 39 S.W. 2d 717; 76 A.L.R. 957. Most authorities state an additional condition, that it appears that the injury was anticipated, or that it reasonably should have been foreseen, by the person sought to be charged with liability. *Scheffer v. Washington City, V. M. & G. S. R. Co.,* 105 U.S. 249; 26 L. Ed. 1070; *Wodnik v. Luna Park Amusement Co.,* supra. Under this theory there must be both foreseeability as to the result of negligence and the injury being a natural and probable consequence of the wrongful act or omission. However, there is another popular view, that anticipation of consequences is a necessary element in determining not only whether a particular act or omission is negligent, but also whether the injury complained of is proximately caused by such act or omission. The authorities supporting this view assert that consequences which reasonably might not have been foreseen are not both natural and probable within the general test of proximate cause. Furthermore, they state that a consequence which might reasonably have been anticipated will be deemed probable, notwithstanding it is not

the ordinary consequence, *Knox v. Eden Musee American Co.,* 148 N.Y. 411; 42 N.E. 988; 31 L.R.A. 779; *International-Great Northern R. Co. v. Lowry,* 132 Tex. 272; 121 S.W. 2d 585. In this type of case all that needs to be shown to establish liability is that a prudent man would foresee some injury or harm might result from his wrongful act and it is unnecessary that he foresee the particular injury that in fact did result, *Pease v. Sinclair,* (C.C.A. 2d), 104 A. 2d 183; 123 A.L.R. 933.

3. Intervening act.

As a general rule, it can be stated that when, between the original negligence and an accident, there intervenes a criminal act of a third person which causes the injury, that the original negligence will not be held to be the proximate cause of the injury finds exceptions where at the time of the original negligence the subsequent criminal act or negligence could have been foreseen, as thus the causal chain is not broken by the intervening act. Thus it is stated in 78 A.L.R. 480 that:

> "The cases vary with the *nature of the community* in which the injury occurred, due to the fact that what might be foreseen under circumstances existing in one community might not be foreseen in another." (Emphasis added.)

While there may be an intervening act which is both independent and responsible, according to *Ford Motor Co. v. Wagoner,* (Tenn.) 192 S.W. 2d 840, 164 A.L.R. 364:

> "The intervening act of even an independent conscious agency will not exculpate the original wronger . . . unless it appears . . . that the negligent intervening act . . . could not have been reasonably anticipated."

In *Daneschock v. Sieble,* 195 Mo. App. 470; 193 S.W. 966, a contractor who placed building materials on the sidewalk beyond the curb, and out into the street, so that pedestrians were compelled to walk out into the street, was, as such result could have been readily foreseen, liable for injuries to pedestrians run down by a reckless motorist.

In *Lombardi v. Wallad,* 98 Conn. 510; 120 Atl. 291; 23 N.C.A. 249, the defendant left an unguarded fire, and a child, after lighting a stick, touched it to the dress of the plaintiff's intestate, the burns proving fatal. The court held that the causal chain was not broken by the intervening act of the child as such act could reasonably have been foreseen by a person of ordinary prudence.

Where two of several crates left unattended and unguarded by the defendant milk retailer on a strip adjacent to and parallel with the curb of a public highway on one side and a public sidewalk on the other, were moved by a stranger into some weeds near the sidewalk, and there obscured from vision, they caused a tractor engaged in mowing weeds to tilt, throwing the tractor off balance, and causing the driver to fall from his seat, whereby he was injured. *Mosley v. Arden Farms Co.,* 26 Cal. App. 2d 130; 157 P. 2d 372. The court pointed out that the question of proximate

cause was essentially one for the jury and that the facts and circumstances of a particular case (here the presence of a nearby school and the resulting heavily traveled sidewalk) must be considered in such determination. Here, even though there was an intervening agency in the chain of causation, the court noted that such agency was not a superseding one exonerating the defendant, because what occurred was reasonably foreseeable and should have been anticipated.

In *Hall v. Coble Dairies, Inc.,* 23 N.C. 206; 67 S.E. 2d 63; 29 A.L.R. 2d 682, the plaintiff alighted from his car in a dazed condition after an auto accident with the defendant's illegally-parked trailer and was struck by a car traveling in the opposite direction. In upholding complaint for personal injuries the court stated that it was not necessary that the tort-feasor foresee the particular consequence of his negligent act or omission, but only that "by the exercise of reasonable care the defendant might have foreseen that some injury could result from his act or omission, or that consequences of a generally injurious nature might have been expected."

In *Hines v. Garret,* 131 Va. 125; 108 S.E. 690, the defendant railroad was held liable where it negligently let the plaintiff off the train beyond the station, she being raped on returning to it. Such intervening criminal act should have been foreseen.

In *McLeod v. Grant County School District No. 128* (Wash.) 225 P.2d 360, children were allowed to play

in the gymnasium of school at noon with a teacher appointed to supervise, and when the teacher absented himself, a school girl was forcibly raped by another student. The school was held liable on the ground that the fact that danger stems from an intervening criminal act, does not exonerate a defendant from negligence, if such intervening force is reasonably foreseeable.

4. **Defendant's negligence in leaving the vehicle unattended, unlocked and with keys in the ignition, will not be insulated so as to relieve him from liability to the person injured in consequence of such negligence, although the immediate cause of the injury was a negligent intervening act or omission of a third person.**

The New York Court of Appeals, in *Maloney v. Kaplan,* 233 N.Y. 426; 135 N.E. 838, has stated broadly that:

> "If one is negligent in leaving a motor vehicle improperly secured, if as a result thereof and in immediate sequence therewith, some other event occurs, which would not have occurred except for such negligence, and if injury follows, such a one is responsible, even though the negligent act come first in order of time."

In *Tierney v. New York Dugan Broths.,* supra, the driver left the safety switch off but unlocked, and the doors open, when he parked in order to make deliveries in a neighborhood where he knew children to be at play. The New York Court of Appeals held that even though the driver did not violate any statute, that in leaving a motor vehicle unattended in a public

street, the question of negligence so as to be liable for an injury to a third person caused by a child starting the vehicle, is a question of fact for the jury to determine.

In *Lomano v. Ideal Towel Supply Co.,* supra, where the driver left the keys in a truck after parking and small boys started the motor causing the truck to back into plaintiff's parked car, the truck owner was liable for damages sustained on the ground that what happened could reasonably have been foreseen and guarded against. See also *Campbell v. Model Steam Laundry,* 130 S.E. 638; 190 N.C. 649.

In *Morris v. Bolling,* (Tenn.) 218 S.W. 2d 754, a drunken passenger of a taxicab drove the taxi away when left alone in the front seat by the driver, with the keys in the ignition. The court found the defendant company liable for injuries resulting from the accident with the plaintiff's parked automobile. Quoting *Garis v. Eberling,* 18 Tenn. App. 1; 71 S.W. 2d 215:

> "Mere fact that intervention of responsible human being can be traced between defendant's wrongful act and injury complained of will not absolve defendant; general rule being that one doing wrongful act is answerable for all consequences ensuing in ordinary course of events, though such consequences are immediately and directly brought about by intervening cause, if such intervening cause was set in motion by original wrongdoer, or was only condition through which negligent act operated to produce injurious result."

And quoting *Fairbanks, Morse & Co. v. Gambill,* 142 Tenn. 633; 222 S.W. 5, 7,

> "The general rule is that what is the proximate cause of an injury is a question for the jury; the court instructing them as to what the law requires to constitute it, and the jury applying the law to the facts. But *whether the question is one to be determined by the jury depends on the facts of each case.* Thus where the facts of the particular case are controverted and are of such a character that different minds might reasonably draw different conclusions therefrom, a question of facts is presented properly determinable by the jury.
>
> "To the same effect is the rule where an independent intervening efficient cause is relied on by the defendant.
>
> "In determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the act—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act."

The court then went on to say:

> "It being common knowledge that the acts of a drunken person are unpredictable, the issue of whether the agent or driver of defendant's cab was negligent by going off and leaving the key in the switch with a drunken passenger alone on the front seat of the cab was a jury question. Also, the issues of whether the defendant's agent under the circumstances might or ought to have foreseen the result of his acts and whether said

> acts contributed to the damages plaintiff sustained were jury questions and not issues to be determined by the court as matters of law, they being questions about which men of reasonable minds would differ." (Emphasis added.)

In *Schaff, et al., v. R. W. Claxton, Inc.,* (1944) 74 App. D. C. 207, 144 F. 2d 532, driver of the defendant's truck left it in a parking space beside a restaurant to which the driver was delivering goods. The truck was left unattended, unlocked and with the keys in the ignition when some restaurant employee drove off in the truck and injured the plaintiffs. The court stated:

> ". . . the evidence in the present case should have been submitted to the jury with instructions to find for the plaintiffs if they found that the defendant's driver was negligent in leaving the car unlocked and that this negligence was the proximate cause of the accident."

and this was so even though defendant's actions were not in violation of any statute or ordinance.

In *Ney v. Yellow Cab Co.,* 117 N.E. 2d 74; 2 Ill. 2d 74 (1952) where the violation of a statute prohibiting parking a vehicle on a public street unattended and unlocked with the keys in the ignition was considered only prima facie evidence of negligence (page 78), the plaintiff, owner of a parked automobile which was damaged while a thief was attempting to make his escape in the defendant's taxicab, brought suit against the defendant taxicab owner for negligently leaving

the cab unattended on a Chicago street without removing the key from the ignition. The court's ruling was premised on the doctrine that the intervention of a criminal act does not necessarily interrupt the relation of cause and effect between negligence and an injury. If at the time of the negligence the criminal act might reasonably have been foreseen, the causal chain is not broken by the intervention. At page 79 the court said:

> "The increase in population and number of motor vehicles owned and operated in this country in the past few years is well known. The increase of casualties from automobile thefts and damages and injuries resulting from such larcenous escapades has accordingly increased. . . . Incidents of serious havoc caused by runaway thieves or irresponsible juveniles in stolen or 'borrowed' motor vehicles frequently shock the readers of the daily press. *With this background must come a recognition of the probable danger of the resulting injury consequent to permitting a motor vehicle to become easily available to an unauthorized person.* . . . The percentage of cases of this nature or the incidents of injury done where an independent force has intervened after such violation, however, is not the standard or measure of liability. We are here concerned only with the question as to whether or not this intervening force is without or within the range of reasonable anticipation and probability.
>
> ". . . Cases similar to the one at bar have reached the higher courts . . . wherein experienced and learned lawyers and judges have differed on this question on probable cause. That reasonable minds can and have disagreed on this question

> cannot be denied. With these incontrovertible facts before us, we recall the reasoning of Justice Cardozo, that the range of reasonable apprehension is at times for the court, and at times, if varying inferences are possible, a question for the jury. *The possibility of varying inferences in a case such as the one before us has been amply demonstrated . . .*"
>
> "Questions of negligence, do care, and proximate cause are ordinarily questions of fact for a jury to decide. . . . It is a fundamental right in our democratic judicial system. Questions which are composed of such qualities sufficient to cause reasonable men to arrive at different results should never be determined as matters of law. The debatable quality of issues such as negligence and proximate cause, *the fact that fair-minded men might reach different conclusions, emphasize the appropriateness and necessity of leaving such questions to a fact-finding body.* The jury is the tribunal under our legal system to decide that type of issue. To withdraw such questions from the jury is to usurp its functions." (Emphasis added.)

In so holding, the Supreme Court of Illinois took note of the then existing conflict in Illinois case law as represented by the First District Appellate Court's ruling in *Ostergard v. Frisch,* 33 Ill. App. 359, 77 N.E. 2d 537, that there was liability under similar circumstances, and the Third District Appellate Court's ruling in *Cockrell v. Sullivan,* 334 Ill. App. 620, 101 N.E. 2d 878, that there was no liability. Thus, the *Ney* case resolved the conflict and the inferior court's rul-

ing in the *Cockrell* case clearly is no longer good authority in Illinois.

5. Cases in which there has been a violation of a statute or ordinance prohibiting the leaving of a motor vehicle unattended, unlocked and with the key in the ignition.

In the case at bar, the alleged facts occurred in the Territory of Alaska. As far as the plaintiff has been able to determine, there is no statute in the Territory of Alaska that prohibits the leaving of an automobile unattended with the keys in the ignition switch.

Regardless, however, the plaintiff maintains that the decisions of cases cited below wherein such a statutory violation was considered should now be followed in deciding whether or not the issues of negligence and proximate cause should be submitted to a jury for determination. While the original fact of negligence may be established by the violation of such statutes, the findings of the courts that reasonable minds might differ as to such negligence being the proximate cause of subsequent injuries caused by an intervening independent act, thus requiring submission of the case to the jury, has been decided independently of the statute. In so deciding, the policy behind the statute, of course, was considered. However, the plaintiff maintains that the presence or absence of a statute is essentially immaterial in establishing the original fact of negligence as previously noted in Section 1, page 5 of this brief, or the resulting proximate cause. To argue otherwise would be to say that since some jurisdictions' recognition of the rapid social transfor-

mations whereby society demands a stronger duty of care among its members, and each to the other, has been translated into statute, another jurisdiction, not having done so, is unable to impose those common law duties which it might otherwise recognize through its judiciary.

In *Ross v. Hartman,* 78 App. D.C. 217; 139 F. 2d 14, the defendant's car had been left in an alley with the keys in the ignition and a third person stole the car and negligently ran over the plaintiff. An ordinance prohibiting the leaving of keys in an unlocked car was used to conclusively show the defendant's negligence in the first instance. That there could have been negligence without such statute was suggested by the court, saying:

> "Everyone knows now that children and thieves frequently cause harm by tampering with locked cars. The danger that they may do so on particular occasions may be slight or great. In the absence of an ordinance, therefore, leaving a car unlocked, might not be negligence in some circumstances, although in other circumstances it might be both negligent and a legal or 'proximate' cause of a resulting accident." (Emphasis added.)

Once having found negligence, the court proceeded to say it was the proximate cause of the accident, not because of the violation of the statute, but because such event was foreseeable. At 158 A.L.R. 1373 N 10, it is emphasized that in the *Ross* case the holding of the negligence to have been the proximate cause was not based upon the statute's violation, but rather as

the consequences were foreseeable. To exemplify this they suggested that if the:

> ". . . intermeddler had simply released the brake of the . . . truck, without making use of the ignition key or unlocked switch, and the truck had thereupon rolled downhill and injured the appellant, the appellee would not have been responsible for injuries because of the negligence of his agent in leaving the switch unlocked, since it would have had no part in causing them."

In *Boland v. Love,* 222 F. 2d 27 (1955), one Coates was hired as a handyman by the defendant. Keys to an automobile owned by the defendant were left by an employee of the defendant above the sunvisor of the defendant's car. Coates, without permission, took the car and drove from Washington, D.C., to Virginia and when returning to Washington, D.C., negligently struck and injured the plaintiff.

The court held on the questions whether there was negligence on the part of the defendant and whether any such negligence was the proximate cause of said injury was a question for the jury. The court said at page 34:

> "It is clear under our common law in applying the standard of ordinary care, that particular conduct, depending on circumstances, can raise an issue for the jury to decide in terms of negligence and proximate cause. . . ."

When so holding the court cited the *Ross v. Hartman,* supra, and *Schaff v. Claxton,* supra, cases, on page 83.

In a 1955 Ohio case, *Garbo v. Walker,* 129 N.E. 2d 537, where a similar statutory violation was considered, the court in overruling the demurrer to the complaint, also discussed man's industrial development, with the resulting benefits to society's members, and the subsequent legal duties consequent therefrom. They concluded that there is a legal duty owing to the injured party in these cases, and that the final decision is to be determined by the jury.

The Ohio court said at page 542:

> "We cannot be unmindful that we live in an age of change. Atomic power, television, jet propulsion, electronics and many other advancements and discoveries were unheard of in the early days of some of us, . . . one may recall to mind what is common knowledge that in this country 100,000 cars were stolen by juveniles in 1953 with the resulting damages to the owners of $150,000,000."

The Ohio court concludes by saying:

> ". . . That the question of whether the defendant in leaving the key in the ignition of her car could reasonably anticipate or foresee that it might be stolen and negligently used by another to proximately cause damage to the plaintiff, was one for the jury."

Also see *Moran v. Borden Co.,* 309 Ill. App. 39; 33 N.E. 2d 166, for the same point on submission of the issue of proximate cause to the jury. In that case the defendant's car was started by a boy in the back of the defendant's home where he had left it with the keys in the ignition, thus violating a statute.

6. **Cases wherein the defendant, by leaving his vehicle unattended, unlocked and with the keys in the ignition, has been held not to have been negligent or that such negligence was not the proximate cause of subsequent injuries to the plaintiff.**

As stated above, the issue of proximate cause is normally regarded as an issue of fact which is to be submitted to the trier of the facts in the usual case. Only if the facts are undisputed and susceptible of only one inference can the causation issue be one of law for the court. Whether an act or omission with respect to the leaving of a motor vehicle on a public street, assuming it is negligent, will result in liability for any subsequent injury or damage if the vehicle has been put in motion by a stranger, depends primarily upon the facts of the individual case, and it is on this basis that the majority of cases holding opposite to the contention of the plaintiff in this case may be distinguished.

In *Simon v. Dew,* 91 A2d 214, the court held that where a car was taken without permission of the owner and lessee of the cab after locking the ignition and leaving the key on the radio in the apartment and someone else obtained it, taking the automobile, the resultant accident was not proximately caused by leaving the keys to one's car in his apartment is negligence. The plaintiff would hardly contend that leaving the keys to one's car in his apartment is negligence. The facts of that case are in variance with those in the case at bar and it is believed that the court in the *Simon* case would not have so held on these facts, for the rules in *Ross v. Hartman,* supra, and

Schaff v. Claxton, supra, would be controlling in their jurisdiction.

In *Lewis v. Amorous,* 59 S.E. 338; 5 Ga. App. 50, the vehicle in question was left in the defendant's place of business, his garage. Correctly, the court stated that it could not:

> "Concede that it would be negligent for a person to leave an automobile in a shop or garage without chaining it down or locking it up . . ."

In *Quellette v. Bethlehem-Hingham Shipyard,* 73 N.E. 2d 592, 321 Mass. 390, the court was unable to find negligence where the stolen vehicle was left in front of the fire station, running, when such was the custom, and further that there was no evidence of negligence on the part of the guards at the gate. Clearly the facts are distinguishable from those in the case at bar for public policy necessitates that fire apparatus be kept in such state that it may readily respond to emergencies.

In *Galbraith v. Levine,* 81 N.E. 2d 560; 232 Mass. 255, again the factual circumstances are not as compelling as those in the instant case in that the vehicle was parked in a private, licensed parking lot and not on a public street. Under these facts the court held that a jury could not reasonably hold the defendant to foresee the theft of his vehicle and thus the resulting negligence, whereby the plaintiff had suffered injury. In addition, it might be well to note that the court in *Garbo v. Walker,* supra, stated:

"The rule in Massachusetts is contrary to Federal decisions and to the decision of the supreme courts of Illinois and California."

In *Fulco v. City Ice Service, Inc.,* 59 So. 2d 198, the court on finding that the defendant's vehicle was left in a private parking lot adjoining the defendant's plant, held it not to be negligent, absent a statute, to leave keys in a vehicle. Here again, the fact that the theft occurred from a private parking lot by the defendant's place of business differentiates it from the facts in the case at bar. There is nothing in the opinion to suggest that had the theft occurred in a different locality that the result would have been the same. Quite significantly that portion of *Ross v. Hartman,* supra, that, ". . . the leaving of a car unlocked might not be negligent in some circumstances, but in other circumstances it could be an act of negligence and therefore a proximate cause of the accident," was quoted with apparent approval. Furthermore, it should be noted that such holding that there was no negligence was not necessary to the judgment inasmuch as the court previously decided said driver was not acting within the scope of his employment.

In *Kiste v. Red Cab, Inc.,* 106 N.E. 2d 395; 122 Ind. App. 587, a thief negligently drove off with the defendant's unattended and unlocked taxicab. The court felt that the mere leaving of keys in a vehicle, in and of itself, was insufficient to show negligence and concluded by saying:

". . . this would not ordinarily be [negligence] except where the surrounding circumstances

> clearly point to both a high probability of intervening crime, and of like negligent operation."

It is the plaintiff's contention that the *Kiste* case would not preclude recovery in Indiana, on the particular facts and circumstances of the case at bar, and that the court would send the case to the jury.

In *Castay et ux v. Katz & Besthoff,* 148 So. 76, the court had no definite evidence before it that a thief in fact stole the car, although it did feel it to be the most likely explanation of its having been set in motion. While holding for the defendant, they did not shut the door on all acts of theft. The court stated:

> "The primary negligence of defendant's driver in leaving the car unattended with the engine running could, under certain circumstances, constitute a continuing act of negligence, and an efficient cause of an accident due to an intervening negligent act subsequent in point of time, if the ultimate consequences may be said to have been such as might reasonably have been foreseen."

And in *Curtis v. Jacobson,* 54 A2d 520, where the defendant's taxicab was stolen from a private driveway where it had been left unattended, unlocked and with the engine running, the court stated, in discussing the question of foreseeability:

> "It must be remembered that the defendant's taxicab was not parked in the street but upon private property."

While recognizing the foreseeability of an intervening criminal act in some cases, the court on page 523,

after stating its approval of holding the defendant liable where children are in the neighborhood, says:

> ". . . it is unreasonable to suppose that a person who has reached years of discretion . . . will conduct themselves similarly."

From the wording the court subsequently used, the plaintiff maintains that the court would have held otherwise had the facts of the instant case been before them, for on page 525 they state:

> "It cannot be said as a matter of law that the defendant's agent was negligent under the circumstances of this case. There was no evidence of surrounding circumstances that defendant's driver had any warning . . . so that the act of a thief could be foreseen."

In a late California case, involving similar facts, *Richards v. Stanley,* 271 P. 2d 23 (1952), there was a majority opinion of three judges and a dissenting opinion of two judges. The majority held that the owner of the vehicle owed no duty to the third person in absence of a statute. The dissenting judges said that when a thief is in flight from the scene of the crime, he normally would not exercise the careful driving habits of the ordinary driver and that the negligence and proximate cause is for the jury.

A 1956 California case, however, *Richardson v. Ham Brothers Construction Co.,* 285 P. 2d 276, stated in dicta that they did not agree with the majority opinion of the *Richards* case. There they sidestepped the Richards holding by differentiating an automobile from a tractor, holding the latter to attract the curi-

osity of people more than an automobile, and thus found the defendant liable. It therefore appears that the California rule is now in conformity with the Federal decisions and those of Illinois, as the court stated in *Garbo v. Walker,* supra.

CONCLUSION.

In the above cited "key cases" varied factual circumstances were before the courts, resulting in a variance of holdings. In those cases the courts were required to decide whether or not an issue of negligence and proximate cause might properly be presented to a jury and in so deciding, two questions invariably were presented to the court:

1. Does an individual have a duty to avoid an act which he might *reasonably foresee* might result in harm to another?

2. Does this duty extend to include the act of a third person?

In most of these cases a third question presents itself, one which requires the court to decide in distinct terms the ultimate answer when it appears in a factual drama of life, as presented in the instant case:

3. Under what factual circumstances may the leaving of a car unlocked, unattended, and with the keys in the ignition, raise an issue for the jury to decide in terms of negligence and legal or proximate cause?

The above questions resolve themselves into a determination of questions or proximate cause and intervening agent. As the cases cited in this brief show, the rationalization of these doctrines has led to a splitting of hairs, disagreement among legal writers, and a conflict of opinion among judges and practicing attorneys as learned and reasonable as we may find as to whether reasonable minds may differ.

These authorities agree that the individual owes no duty to anticipate the act of the intervening third party tort-feasor unless he could reasonably foresee it.

This does not necessarily mean that the acts of all third party tort-feasors must be anticipated, but it does mean that if common human experience would lead the reasonable man to consider that his act might result ultimately in harm to another, then the question of whether injury could have been reasonably foreseen under the particular facts involved is for the jury.

These authorities are also agreed that in these "key cases", at least under some circumstances, the question of negligence and proximate cause is for the jury and though the circumstances are seldom spelled out, the particular facts of this case, particularly the locality in which the incident occurred, so differentiate it from the other "key cases" that it would be difficult to imagine a real life fact circumstance more compelling in its inference of negligence and resulting proximate cause of damage.

The defendant parked his vehicle on a public highway in front of a night club. Within a radius of a

few hundred yards there were several other "clubs" and "bars", their proximity to each other giving rise to their location being referred to as "the strip".

While the driver of the truck left his vehicle unattended, unlocked, and with the keys in the ignition, along "the strip" on a Sunday at approximately 8:30 A.M., it should not be supposed that a tranquil scene such as might occur in the United States on a Sunday morning can be envisioned in that locale. Fairbanks is not such a city. It is a "boom town" which has experienced an enormous doubling and redoubling of its population since the early 1940's. It does not have the usual stability of the Stateside town. In addition, two large installations of the United States Air Force are located nearby, so that it has an unusually large populace constantly visiting. That the conduct of such military visitors, as well as some of the local citizens, is often rowdy, irresponsible, and generally excessive, results largely from the general lack of entertainment facilities in this locale. What little entertainment that does exist can, for the most part, be found at such "clubs", and so on "the strip" Sunday morning becomes merely an extension of Saturday night. Furthermore, "the strip" is frequented more heavily on weekends when the military normally receive their "passes" and thus join the local populace. It was such an hour as this that the driver parked his vehicle on "the strip", leaving it unattended and unlocked with the keys readily available, despite his knowledge that business was continuing

strongly on "the strip". These are the facts which make the case at bar so different from the cases previously noted. The situation here was more perilous, for at that hour the likelihood of "drunks" in the vicinity was all the more probable, the entertainment seekers having had several hours in which they could become thoroughly inebriated.

In leaving the truck in such a manner the driver acted unreasonably. It was not the act of a prudent person and under the circumstances the plaintiff maintains that such actions were gross negligence. The driver's actions were in complete disregard to the safety of the community.

The plaintiff maintains that the court should take judicial notice that intoxicated persons have not the normal use of physical and mental faculties by reason of their use of intoxicating liquor, *Cox v. State,* 150 S.W. 2d 85, 86; 141 Tex. Cr. R. 561. As such, for the period during which they remain intoxicated, they must be treated as an irresponsible group, much as children are, and a wide variety of unpredictable conduct must be contemplated—sulking, exuberance, ill-temper, fighting, vulgarity, pulling stunts, taking "dares", stealing, and otherwise exhibiting conduct which in their normal state they would not do. The scope of their conduct which must be foreseen is very broad. Can the foreseeability that such conduct might lead to the "taking" of a car be improbable, especially when, as in the instant case, such car is made readily accessible to them? Furthermore, it is

common experience that persons of a criminal nature frequent such "clubs" and "bars" in higher proportion than most other groups.

The driver in the instant case has lived in the Fairbanks vicinity long enough to be familiar with these facts. His failure to use ordinary prudence under the circumstances was inexcusable. He was allowing an otherwise harmless instrument to be put under the control of one who could not be expected to exhibit responsible conduct, whose normal physical and mental faculties were lacking. That he should fail to foresee the exact results as in fact they did occur, the death of an unsuspecting woman, is no excuse. Whether the taker be intoxicated or merely a sober thief, he could not expect that the vehicle would be driven other than in a negligent manner—the intoxicated driver because he did not have full control over his physical and mental faculties, the sober thief because of the expected anxiety to "get away" from the scene of his theft. Anyone who indulges in the use of intoxicants is a potential menace to the public safety as an automobile driver, *Crowell v. Duncan,* 50 A.L.R. 1425; 145 Va. 489.

Furthermore, the theory that one need not foresee the exact nature of the harm resulting from his negligence has become a popular doctrine in tort law as exemplified by those cases holding that where the owner furnishes an automobile to a person whom the owner knows, or from facts known to him should know, is likely to drive while intoxicated, the owner is liable for any injury which results as a proximate

consequence of the operation of the automobile by such person while intoxicated, *Petermann v. Gary,* 49 S.E. 2d 828; 218 Miss. 438; *Mitchell v. Churches,* 206 P. 6; 119 Wash. 547.

While the court might not feel, as the plaintiff contends, that this in fact is a situation in which reasonable men could not differ—that on finding such facts they would have to find negligence and with it the resulting proximate cause of the fatality to the plaintiff's decedent, still, the plaintiff maintains that at the very least it is a situation in which reasonable men might differ, and so must be submitted to a jury. The case law quoted above makes ample provision for such a ruling.

Should the court, however, feel that the ruling which the plaintiff seeks is inconsistent with existing case law, or that it would not be wholly consistent with it, thought should be given to expanding it. For here we have a dead mother—a former member of society, only so because the duties and care owing her by other members of society were negligently disregarded.

In *Wagner v. Arthur,* 134 N.E. 2d 409, Ct. Common Pleas, Ohio (1956), the court held the defendant not liable for the consequences of his acts in leaving his vehicle unattended, unlocked, and with the keys in the ignition, distinguishing *Garbo v. Walker,* supra, as there was no statute prohibiting such conduct. Significantly, the court concluded by saying:

> "The temptation was great to reach the opposite conclusion and to write philosophically on this question; to discuss man's industrial development

from the manual to the simple tools era, to the mechanical-steam era, to the mechanical-electrical era, to the mechanical-electronic era and finally to the mechanical-atomic era; and thereby show society's benefit to each of its members; to show the duty and obligation of each, who enjoy society's benefits, to others in society; and to compare and present, by analogy, the theory of this plaintiff to that of the first plaintiff who succeeded in obtaining the engraftment of the doctrine of respondeat superior into our law. That temptation was set aside in favor of stare decisis, and to avoid too precipitous a change through an inferior court. *The theory now contended for by the plaintiff in this case will become law* some time either legislatively or judicially, and if by the latter process, it should be through the reviewing courts to whom the pioneer (the plaintiff) should appeal." (Emphasis added.)

If the court, then, is unable to decide this case within the framework of the present case law, and thereupon find such facts should be submitted to the jury, the plaintiff assumes the role of the "pioneer" in appealing this case to this Court of Appeals for what must eventually be a recognition of the legal duties owing the plaintiff's decedent in this case. The plaintiff cannot concede that such duties must be spelled out only by statute. The plaintiff fully subscribes to the sage philosophy expressed in *Ney v. Yellow Cab Co.,* supra, wherein the court states:

"Justice requires that we do more than honor and respect prior judicial decisions, for if only these two considerations were our guideposts then the

path of jurisprudence would never change irrespective of a changing world."

Dated, Fairbanks, Alaska,
June 20, 1957.

Respectfully submitted,

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